Google Inc. et al v. Egger et al Doc. 601

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7183

Petition of Eight Ratepayers for an investigation of possible disclosure of private telephone records without customers' knowledge or consent by Verizon New England Inc., d/b/a Verizon Vermont	)

Docket No. 7192

Petition of Vermont Department of Public Service for an investigation into alleged unlawful customer records disclosure by Verizon New England Inc., d/b/a Verizon Vermont	)

Docket No. 7193

Petition of Vermont Department of Public Service for an investigation into alleged unlawful customer records disclosure by AT&T Communications of New England, Inc.	)

Order entered: 10/31/2007

PROCEDURAL ORDER

I. Summary

These proceedings involve the alleged practice of two Vermont telecommunications carriers in providing customer record information to the National Security Agency. In today's Order the Vermont Public Service Board reactivates the dockets and establishes a schedule for discovery. Since the federal courts are considering the merits of the government's claims regarding the s tate secrets doctrine, we also limit the scope of the current proceedings to avoid conflict with that doctrine, allowing for subsequent examination of those issues if the doctrine should ultimately be held to be inapplicable.

Dockets.Justia.com

PROCEDURAL HISTORY

Dockets 7183 and 7192 were opened to examine whether Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"), had violated a variety of Vermont utility standards by directly or indirectly providing customer record information to the National Security Agency ("NSA") or other federal or state agencies ("NSA Customer Records Program"). Docket 7183 was initiated by a petition filed on May 24, 2006, by the American Civil Liberties Union of Vermont ("ACLU") and by eight Vermont ratepayers. Docket 7192 was initiated by petition of the Vermont Department of Public Service ("Department" or "DPS") filed on June 21, 2006.

Docket 7193 was opened to examine whether AT&T Communications of New England, Inc. ("AT&T") violated Vermont utility standards by disclosing customer record information to the National Security Agency or other federal or state agencies. It was initiated by petition of the Department filed on June 21, 2006. The two proceedings were joined for the purposes of discovery, hearing and briefing.[1]

On October 2, 2006, the federal government filed *United States v. Volz*, a suit in the Federal District Court for the District of Vermont against the Chair and Members of the Public Service Board and the Commissioner of the Department of Public Service in their official capacities.[2] In *Volz*, the government sought to halt these investigations, asserting that:

> [c]ompliance with the ordered production or similar discovery, issued by those officers under state law, would . . . place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security.[3]

The government asserted several bases in support of its complaint, including its exclusive authority over foreign affairs, the Supremacy Clause of the United States Constitution, preemption and the "state secrets" privilege.

Subsequently, *Volz* was transferred by the federal Judicial Panel on Multidistrict Litigation to the United States District Court for the Northern District of California and

1. Order of 7/12/06.
2. Case No. 2:06-cv-188 (D. Vt. Oct. 2, 2006) ("*Volz*"). AT&T and Verizon were also named defendants in the suit.
3. *Id.* at 1-2.

consolidated with four similar cases against state utility commissions. The cases were assigned to Judge Walker, and dispositive motions were argued.

Awaiting an outcome of the federal proceedings, these dockets have remained largely dormant. In March of 2007, this Board issued an Order anticipating a federal decision in the summer of 2007 that would assist in clarifying the allowable breadth of our inquiry. The Order stated that the Board had no immediate plans for hearings.[4]

On July 24, 2007, Judge Walker did issue a decision in *NSA Telecommunications Records Litigation*.[5] He denied the government's motion for summary judgment with respect to its claims under the Supremacy Clause and the federal government's powers over foreign affairs. However, with respect to the state secrets privilege, Judge Walker denied the government's motion without prejudice to its renewal following an anticipated Ninth Circuit decision in a related case that also raised the state secrets privilege.[6]

On October 18, 2007, the Department provided copies of letters sent by respondents Verizon and AT&T to three members of the United States House of Representatives ("October letters"). In those letters the carriers discussed their compliance with several laws, including the Foreign Intelligence Surveillance Act ("FISA") and the emergency pen register or trap and trace requests statute. Significantly, however, Verizon noted that its responses excluded "any information, discussion, reference to or representations concerning its cooperation, if any, with classified intelligence gathering activities."[7] Both carriers acknowledged that they provided customer information to law enforcement officials in a wide variety of contexts. As AT&T stated it, "telecommunications carriers are authorized to assist government agencies in a wide variety of circumstances, only some of which require judicial process."[8]

Accordingly, the issue before the Board is whether, in light of Judge Walker's ruling and the October Letters, the Board should proceed with its investigation or should await further

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4. *See* Orders dated 3/29/07.

5. *In re Nat'l Sec. Agency Telecomm. Records Litig.*, MDL Dkt. No. 06-1791, 2007 WL 2127345 (N.D. Cal. July 24, 2007) ("*NSA Telecommunications Records Litigation*").

6. *See Hepting v. AT&T Corp.*, Docket No. C-06-672 VRW (N.D. Cal.).

7. Verizon letter at 2; *see also,* AT&T letter at 2.

8. AT&T letter at 2; *see also,* Verizon letter at 3-4.

developments in the federal proceeding regarding the state secrets privilege. A status conference was held in all three dockets on September 18, 2007. Thereafter the parties submitted briefs and reply briefs on whether this docket should be reactivated and, if so, what schedule should be followed.

II. Positions of the Parties

A. Department of Public Service

The Department recommends establishing a schedule now, and that discovery can be crafted to allow the parties to "determine whether Verizon has violated Vermont law regarding the privacy of its customers' information without running afoul of the state secrets privilege."[9]

The DPS contends that *NSA Telecommunications Records Litigation* has now provided guidance sufficient to determine the company's compliance or non-compliance with state laws regarding protection of customer records.[10] In sum, the DPS maintains that the scope of these dockets is general, and grounds for relief can be demonstrated without inquiry into the existence or operation of any specific program of intelligence gathering conducted by the federal government.[11] The DPS argues that Judge Walker's decision suggested that a state proceeding can avoid these prohibited federal issues.[12]

Therefore, the DPS contends that at least some of the issues in these dockets are outside the state secrets privilege. These include, the DPS asserts, whether the recent and current content of Verizon's customer privacy policy complies with Vermont law; the nature of Verizon's understanding of what constitutes legal authorization for disclosure of customer records without seeking details regarding reliance on any specific authorizations in any particular instance; and, whether Verizon has ever turned over customer records to any entity absent one of the authorizations the company believes it is entitled to rely on, without seeking details regarding the

9. DPS Comments at 8.
10. DPS Comments at 1.
11. DPS Reply Comments at 5-6.
12. DPS Comments at 4.

identity of the third party receiving the information, the identity of the impacted customer, or details about the content of the information disclosed.[13]

The DPS also asserts that Verizon, in particular, has ended the secrecy surrounding certain factual issues.[14] Although only the government can waive the privilege, disclosures by non-governmental parties can reduce the scope of matters that are actually secret.[15]

The DPS reports that it is willing to withdraw its initial letter inquiries to Verizon and AT&T, dated May 17, 2006. The Department states that it currently intends to craft new information requests that follow the guidance from the recent federal court decisions to avoid conflict with the state secrets privilege.[16]

B. Intervenors

The ACLU asks that the Board set a schedule and proceed with discovery, including depositions.[17] It claims added urgency based on a published interview with the Director of National Intelligence ("DNI") in the *El Paso Times*. That article acknowledged that the government has received cooperation from some telephone companies in a "Terrorist Surveillance Program" and that the government is seeking Congressional legislation immunizing carriers from liability.[18]

The ACLU asserts that it has been about a year since the Department of Justice ("DOJ") sued the Board, and although DOJ has "vigorously pursued those cases, it has lost at every step of the way." ACLU concludes that while delay might have made sense initially, action is needed now so that

> neither the telecommunications companies nor the government can continue to hide behind a claim that disclosure of these insidious activities [involving communications content and records] will compromise national security.[19]

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13. DPS Reply Briefs at 7.
14. DPS Comments in 7183 at 7.
15. *See* Docket 7183 Order of 9/18/06 at 21.
16. DPS 7183/7192 Reply at 4-5; DPS 7193 Reply at 4-5.
17. ACLU Brief at 1, 3.
18. ACLU Brief at 1-2.
19. ACLU Brief at 2.

Intervenor Michael Bandler argued to reactivate these dockets, in part based on the October Letters and in part based on his expectation that the federal litigation regarding state secrets is unlikely soon to be concluded. Mr. Bandler also proposed a schedule for discovery.

C. The Carriers

AT&T and Verizon both oppose reactivation of these dockets. Primarily they contend that the *NSA Telecommunications Records Litigation* court has not resolved the state secrets issue and is awaiting guidance from the Ninth Circuit. Until that guidance arrives, the carriers contend that these dockets should remain inactive, consistent with the Board's Order of March 29, 2007.[20]

Both carriers maintain that allowing discovery concerning their alleged cooperation with the NSA would likely, or even certainly, lead to the issuance by the federal court of a prohibitive injunction.[21] They claim that three federal court decisions have held "that information related to the alleged NSA call records program is shielded by the privilege"[22] and that Judge Walker, the presiding judge in *NSA Telecommunications Records Litigation*, has held that there can be no discovery where the state secrets doctrine has been invoked.[23] They also note that a federal district court recently enjoined the Maine Public Utilities Commission from proceeding in a similar state regulatory docket.[24] Verizon argues that an injunction is more likely because reactivating these dockets would disturb the *status quo* and disproportionately harm the federal interest.[25] AT&T also complains about the unnecessary expense of participating in litigation over

20. Verizon opposition at 1, 7; AT&T comments at 3.

21. AT&T comments at 2 ("[I]t appears certain that the United States would seek a preliminary injunction to bar the disclosures and preserve the status quo until there is a final ruling on its motion for summary judgment and that the District Court would grant this injunction."); *see* Verizon opposition at 11 ("federal government likely would have no choice but to seek preliminary injunctive relief from the district court"; injunction would be "inevitable").

22. Verizon opposition at 11; *see also* AT&T comments at 3; Verizon reply at 5 (every court that has considered the call records program "has concluded that inquiry into even the existence or nonexistence of such a program is precluded by the state-secrets privilege").

23. AT&T comments at 3, 9.

24. *Id.*, citing *United States v. Adams*, 473 F.Supp.2d 108 (D. Me. 2007) (enjoining the Maine PUC).

25. Verizon opposition at 12.

this issue,[26] which it claims places it "in the middle between the competing demands of two sovereigns."[27]

As to events subsequent to last March's procedural orders postponing action, both carriers contend that these events should counsel against reactivation.[28] Notably, they assert that the current NSA director, General Alexander, has filed a declaration in federal court stating that these proceedings "cannot be disclosed, confirmed, or denied, without causing exceptionally grave damage to the national security of the United States."[29]

Although the government has acknowledged a *contents* surveillance program involving some foreign communications, the carriers contend that the government has never acknowledged the existence of a program that involves release of customer calling *records*.[30] The carriers contend that the *El Paso Times* interview with the DNI disclosed no new information[31] and merely reiterated prior disclosures concerning content surveillance.[32]

The carriers also argue that discovery cannot be narrowed sufficiently to avoid conflict with state secrets. AT&T contends that the privilege covers "any factual disclosure that would assist the Department in determining whether there is any relationship between AT&T and a NSA

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26. AT&T comments at 2 (activating these dockets would "serve only to create an unnecessary emergency for Judge Walker and to impose wholly unnecessary expenses on AT&T").

27. AT&T comments at 2.

28. AT&T comments at 1-2; *see* Verizon opposition at 5.

29. Verizon opposition at 9; Verizon reply at 3; *see also* AT&T comments at 4. The declaration was filed after the Board denied Verizon's motion to dismiss in September, 2006, in part on the grounds that the state secrets privilege had not been properly claimed by government action. The motion was also denied because the state secrets privilege did not apply to all of petitioners' claims and because some of the matters involved in these dockets are not secret. Order of 9/20/06.

30. Verizon opposition at 11.

31. AT&T comments at 9.

32. AT&T comments at 2; Verizon opposition at 10-11.

calling records program - much less an 'inappropriate' one."[33] AT&T specifically rejects several possibilities for limiting the scope of these dockets.[34]

In sum, the carriers argue that this docket is no more urgent than last March, when the Board issued an Order saying that it had no immediate plans for hearings. The carriers urge the Board to "wait during the period of time that is required for a final appellate resolution of [the Ninth Circuit case on state secrets] and for Judge Walker to decide the issue on the merits" of whether the state secrets privilege applies.[35]

If the Board decides to reactivate the proceedings, AT&T asks for a schedule that would spare carriers the unnecessary expense and frustration of dealing with information requests that might be enjoined.[36]

D. The Department of Justice

The DOJ[37] filed a letter on September 26 making many of the same arguments as the carriers.[38] The DOJ contends that Judge Walker has made clear that his court will decide when and whether state investigations may proceed and will do so only after receiving guidance regarding the state secrets doctrine from the Ninth Circuit. The DOJ also asserted that nothing has occurred in the past year that warrants resuming these dockets. The DOJ warned that it would seek immediate injunctive relief if the Board should authorize discovery as to whether and to what extent carriers may have any relationship with the National Security Agency or whether the

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33. AT&T comments at 7.

34. AT&T comments at 7. These include:
- examining whether disclosures of bulk call records are being made without determining the specific authority under which they have been made or the particular agency to which they are (suggestion made at recent status conference);
- asking carriers a 'hypothetical question' about what they would do if they were asked to make bulk disclosures to NSA in the absence of a warrant (suggestion from previous Board Order);
- examining whether the carriers should amend their privacy policies because "no evidence can be presented that they have violated their existing policies without violating the privilege."

35. AT&T comments at 10; *see* Verizon opposition at 2.

36. AT&T proposes that if a schedule is adopted, it provide that answers to information requests not be due until the later of 60 days after they are served or 30 days following the entry of a final and non-reviewable order denying a motion for a preliminary injunction. AT&T comments at 10.

37. Although the DOJ was invited to intervene, it has not done so and is not a party.

38. Nothing on the DOJ letter suggested that it had sent copies to the parties. On September 27, the Clerk of the Board sent a copy of the letter to all the parties.

carriers participated in an alleged call records program. Finally, if the Board decides to proceed, the DOJ requested adequate opportunity to seek injunctive relief and sufficient time for Judge Walker to consider such a request.

III. Discussion

Given the significant past delays in this proceeding, we have decided to allow discovery and to establish a schedule for further proceedings, albeit with a carefully limited scope.

A. Scope

These dockets were commenced many months ago. Since we have put these dockets on hold in deference to asserted federal claims, we have not exercised our authority under state law to determine whether the carriers have complied with Vermont law. Because these dockets have been on hold, this Board has declined or been unable to use its authority under state law to protect customer calling records from improper disclosure. This Board's supervisory authority extends to the customer privacy policies and practices employed by Vermont's regulated telecommunications companies.[39] Moreover, the Department of Public Service has been unable to obtain information about carrier practices, a function critical to its ability to adequately perform its responsibilities.[40]

Over the past year the federal courts have better defined the permissible scope of these state utility commission investigations. They have rejected a number of the government's claims, and they have found that states retain significant authority for consumer protection activities. For example, Judge Walker observed in *NSA Telecommunications Records Litigation* that FISA actually anticipates the application of state law remedies when a carrier discloses business records without proper authorization.[41] In the same opinion, Judge Walker noted that some questions posed in state investigations fall outside the scope of the state secrets privilege,[42] and, at least in

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39. *See* PSB Rule 7.608 (effective 7/21/06) (setting forth privacy protections for customers of telecommunications companies providing service in Vermont).

40. *See* Order of 6/27/06 at 1.

41. *NSA Telecommunications Records Litigation*, slip op. at 11.

42. *Id.* at 18.

the context of conflict preemption analysis, state investigations will not inevitably conflict with federal law.[43]

Moreover, the recent carrier letters to Congress state that the companies are providing information to the government in a wide variety of circumstances, including some without judicial oversight. We seek to understand more about the nature of these practices, in large part so that we can determine whether the companies' privacy policies and practices should more accurately disclose the variety of the carriers' actual practices. Also, as we have previously noted, the state secrets privilege does not block consideration of whether Verizon's responses to the Department were misleading and inaccurate.[44]

The state secrets privilege issue is still pending in the Ninth Circuit Court of Appeals. We understand that all federal courts have previously disallowed discovery into matters allegedly protected by that privilege.[45] However, we do not understand the privilege to be so broad as to prevent general inquiries into the practices of telecommunications carriers in responding to requests from third parties for protected consumer information.

For these reasons, we define a narrow scope of issues for the current phase of these dockets, intending thereby to exclude all matters lying within the current claims of state secrecy.[46] Moreover, since this Board has all the powers of a court of public record for all matters within its jurisdiction,[47] we intend to exercise strict oversight of discovery.[48]

This phase of the docket may examine the following topics:

(1) Current and recent written carrier policies regarding requests from the government for the release of customer records, including any policies describing when warrants, letters and certifications are prerequisite and when, if ever, they are not required, and associated records.

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43. *Id.* at 13.

44. Order of 9/18/06 at 19-20.

45. *E.g., ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007).

46. If the state secrets claim is later invalidated, we will broaden the scope, and we will conduct a second phase of discovery and hearings if needed.

47. 30 V.S.A. § 9.

48. *See* PSB Rule 2.103 and 2.214 (adopting the Vermont Rules of Civil Procedure generally and discovery rules in particular for proceedings before the Board).

(2) The carriers' actual practices in determining whether to comply with requests from the government for the release of customer records, including carrier record-keeping practices regarding both the government's requests and their own responses.[49]

(3) The frequency with which the carriers have actually released customer records information to the government, the scope of those disclosures, the legal authority, if any, relied upon, and associated records, including unclassified national security letters or certifications required by statute or executive order.

(4) The accuracy and sufficiency of the carriers' existing customer privacy notices regarding release of customer record information.

(5) Whether past responses from the carriers to the Department or statements to the public were misleading and inaccurate.

We also want to ensure that nothing in these dockets encroaches on matters privileged by the state secrets doctrine, until the federal courts have ruled on that issue. Therefore, notwithstanding the preceding list, all of the following material is excluded from the current scope of these dockets:

(A) Whether specific telecommunications carriers assisted the NSA with an alleged foreign intelligence program involving the disclosure of large quantities of records pertaining to customer communications;

(B) If such a program exists, the precise nature of the carriers' alleged involvement and details concerning the NSA activities.[50]

If the federal courts should later invalidate the government's state secrets claim, we intend to expand the scope of these dockets to cover those matters as well.

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49. Conceivably, a carrier might have multiple tracking and recording systems. For example, it may have one system for ordinary criminal and civil subpoenas, a second for disclosures made under the Pen Register Act, FISA and other similar statutes where the prerequisites to disclosure are public knowledge, and yet a third for "state secrets" matters that allegedly cannot even be discussed.

50. The description of the excluded items is intended to be identical to General Alexander's declaration defining the scope of state secrecy. *See NSA Telecommunications Records Litigation*, slip op. at 18.

We also emphasize that our inquiry in this phase will be limited to examining the practices of the carriers that are subject to our supervision. It is beyond the scope of this docket to examine in any respect the practices of the federal government, including how it may process information received from the carriers.

B. Bandler Discovery in Docket 7183

On March 15, 2007, Docket 7183 Intervenor Michael Bandler, issued 27 interrogatories to Verizon. Those interrogatories generally covered two areas. The first set of questions concerned previous Verizon news releases, asking whether those news releases were true and reasonably complete and asking Verizon to define certain terms. Second, the interrogatories asked more general questions regarding how Verizon complies with the law. For example, they asked whether and when Verizon considers release of information to be "authorized by law absent an appropriate Court Order," and they asked how Verizon reaches such decisions. They asked what Verizon believes its obligations are when and if it releases information to a government agency that is not authorized by law. They asked whether and how Verizon might be prevented from truthfully denying participation in a "classified program." They asked specifically whether Verizon has within the last five years released information to a government agency that was not authorized by law. Finally, they asked Verizon how it safeguards customers' privacy when the legality of a governmental program is fairly debatable.

Verizon filed nine general objections, including preemption and overbreadth. Bandler filed a Motion to Compel on May 18, 2007, and Verizon filed its opposition on June 4, 2007, recommending denial. Verizon restated its earlier substantive objections, which in summary are that "federal law bars Verizon from disclosing" the information sought by Bandler, and it also "preempts the Board from requiring such disclosures."

After Verizon's response was filed, Judge Walker issued *NSA Telecommunications Records Litigation*, a significant decision that rejected some of the grounds asserted by Verizon, such as preemption. Moreover, Verizon's subsequent letter to Congress may have answered some of the factual questions propounded by Bandler, possibly eliminating the secrecy of some previously alleged state secrets. On or before November 14, 2007, Verizon shall file a revised opposition statement to the pending motion updating its arguments in light of *NSA Telecommunications Records Litigation* and in light of Verizon's recent disclosures. Verizon shall, in particular, address whether it is possible for it to answer any or all of Mr. Bandler's second group of questions (involving Verizon's practices and policies) without violating the state secrets privilege.

IV. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that: the following schedule is established for the next phase of these dockets:

November 9, 2007	First round of discovery on carriers, copies served on all parties and DOJ[51]
November 23	Responses due
December 7	Second round of discovery, copies served on all parties and DOJ
December 21	Responses due
January 11, 2008	Petitioners file testimony
January 25	First round of discovery on petitioners
February 8	Responses due
February 22	Second round of discovery on petitioners
March 7	Responses due
March 21	Carriers file rebuttal testimony
March 28	Third round of discovery on petitioners
April 11	Responses due

Technical hearings and briefing schedules will be determined at a later time.

51. Copies of discovery requests shall be filed with Carl J. Nichols, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Washington D.C. 20530.

Dated at Montpelier, Vermont, this 31st day of October, 2007.

s/James Volz	)	
	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
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OFFICE OF THE CLERK

FILED: October 31, 2007

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

CONCURRENCE OF JOHN D. BURKE

While I am willing to concur today in the decision of my colleagues as to the extent of discovery in this docket, I would have gone further. Specifically, I would have allowed discovery as to whether specific telecommunications carriers assisted the NSA with an alleged foreign intelligence program involving the disclosure of large quantities of records pertaining to customer communications. I agree with my colleagues' decision, however, to limit, for the time being, inquiry as to the precise nature of the carriers' alleged involvement and details concerning the NSA activities.

Our Constitution should be viewed in its historic context. When the Constitution was drafted its authors were mindful of what they perceived as an abrogation of individual rights foisted on their immediate forefathers. Many of them had knowledge of their fathers or grandfathers being jailed as a result of body writs, sometimes for years, without charges being brought, and even when they were charged, it was often the result of an ex post facto enactment. Thus the authors' bias was for strong protection of individual rights and liberties. The right to privacy is such an individual right which is entitled to the same protection. It is not the alleged request by a government agency for such information that is at issue here. Rather, it is the companies' alleged compliance with that request for such material that would be problematic.

If these allegations are proven true, the citizens and ratepayers of our state should have the right to attempt to obtain redress from those who provided such information.

There has been so much publication of the possibility of such activity, it is hard to believe that the "evildoers" aren't aware of the potential peril of using this voice communication system. Thus there is no "secret" for the states secret doctrine to protect. If this activity occurred, there are only the interests of Verizon and AT&T to protect in this docket. I would let our citizens and ratepayers know what happened, if anything, and let them pursue any remedies they might find appropriate if this activity did occur.

Dated at Montpelier, Vermont, this 31st day of October, 2007.

s/John D. Burke
John D. Burke, Board Member